

# The SHOSHONE-BANNOCK TRIBES

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August 25, 2006

Mr. Darryl Francois  
Attn: 1813 ROW Study  
Office of Indian Energy and Economic Development  
1849 C Street, NW, Mail Stop 2749-MIB  
Washington, DC 20240

Mr. David Meyer  
Attn: 1813 ROW Study  
Office of Electricity Delivery and Energy Reliability  
Department of Energy  
1000 Independence Ave., SW  
Washington, DC 20585

Dear Mssrs. Francois and Meyer:

On August 8, 2006, the United States Departments of Interior and Energy issued its report entitled, "Draft Report to Congress: Energy Policy Act of 2005, Section 1813, Indian Land Rights-of-Way Study." (hereinafter "Report"). On behalf of the Shoshone-Bannock Tribes of the Fort Hall Reservation, located in southeast Idaho, we submit the following comments on the Report in connection with the study of the energy rights-of-way on tribal lands which the Departments of Energy and Interior (collectively the "Departments") are conducting pursuant to Section 1813 of the Energy Policy Act of 2005.<sup>1</sup>

On January 20, 2006, initial comments were submitted on our behalf by the Sonosky, Chambers, Sachse, Endreson and Perry Law firm. In addition, on March 7-8, 2006, we participated in the first scoping meeting held in Denver, Colorado, and provided and submitted into the record a power point presentation to the Departments regarding our position on Section 1813, and set forth some basic information about the Fort Hall Reservation and history of the rights-of-way impacting our lands. On May 12, 2006, we submitted extensive comments to the

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<sup>1</sup> Pub. L. No. 109-58, tit. XVIII, 119 Stat.594, 1127-28.

Departments which focused on the first study area of historic rates of compensation to the Shoshone-Bannock Tribes from the energy industry.

The Report presents a summary of the comments received from tribes and energy companies and highlights the major issues raised including, tribal sovereignty, increasing right-of-way costs and concerns raised by industry about consumer costs. The Report then discusses the four study areas – tribal sovereignty and self-determination, historic rates of compensation, national energy transportation policies and standards and procedures for determining compensation. The Report also sets forth a range of options for the stakeholders, the Departments and Congress to consider. Finally, the Report incorporates a study of historic rates of four tribes completed by Historical Research Associates for the Departments.

### COMMENTS ON THE DRAFT REPORT

The primary purpose of our letter is to provide the Departments with comments on the draft report. We would like to commend the Departments for their efforts in completing this Report following the numerous comments of tribes, the energy industry and the general public. The rights-of-way issues addressed in this Report are of monumental significance to the tribes as they touch upon treaty rights, tribal sovereignty and self-determination, preservation of tribal lands and natural and cultural resources, and the federal trust relationship between tribes and the federal government. Additionally, the Report impacts the ongoing business relationship between energy industry and tribal governments. Generally, we are supportive of the tenor of the Report and its findings as the Report adopts and recognizes the position voiced by many tribal leaders, and rejects the unfounded claims of industry.

**Tribal Sovereignty and Consent Required.** We support the Departments' recognition of the vital importance of the exercise of tribal sovereignty and the inherent authority of tribes to consent to energy rights-of-way across their lands.<sup>2</sup> This finding is consistent with the current law requiring tribal consent to rights-of-way across tribal lands.<sup>3</sup> It is also well supported by the treaties and agreements with tribes which recognize the land ownership and sovereign powers over tribal lands, and the legal fiduciary obligation of the United States to preserve and protect tribal property. By these treaties and agreements, the tribes reserved their governmental authority and ownership of part of their aboriginal land base. The title to this reserved land remains held in trust by the United States for the benefit of Indians. Under the federal trust responsibility it is the duty of the United States to protect the Indians' rights to the lands they reserved.

The long standing federal policy of tribal self-determination also requires tribal consent for use of tribal lands. Beginning in 1934 with the passage of the Indian Reorganization Act, the Congress recognized the loss of tribal lands and enacted a statute which affirmed tribal power "to

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<sup>2</sup> Report at 14.

<sup>3</sup> 25 U.S.C. § 324; 25 C.F.R. § 169.3(a).

prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other assets without the consent of the tribe.<sup>4</sup>

**Bilateral Negotiations.** We support the Departments' finding that most energy rights-of-way negotiations are successfully completed. This is true even if the negotiations are protracted and the method for determining the value of the energy rights-of-way results in compensation that sometimes greatly exceeds the market value of the tribal lands involved.<sup>5</sup> As we presented in our comments in May to the Departments, we have consistently reached agreement on the terms for rights-of-way across tribal lands through bilateral negotiations with the energy companies. The negotiations have been successful from the Tribes' perspective. Since 1994, the Tribes have successfully concluded rights-of-way agreements with Intermountain Gas Company, Northwest Pipeline Company, Utah Power and Idaho Power Company. These agreements provide certainty and stability to the energy companies over the time periods (20-23 years) they exist. All of these negotiations involved renewal of existing lines on the Reservation. The negotiation time periods for each rights-of-way varied ranging from six months to eight years. At times the negotiations were difficult but the parties worked in good faith to resolve their differences. Each proposed energy right-of-way over Tribal lands had unique characteristics such as whether the particular right-of-way transporting energy: traversed large compact contiguous tracts of land; impacted lands of cultural or religious significance; impacted agricultural lands; provided utility services to reservation residents; involved a large number of individual landowners; and required an environmental assessment.

The end result of these bilateral negotiations has been a reversal of the paternalistic practices of the Bureau of Indian Affairs in negotiating rights-of-way on the Reservation and enabled the Tribes and individual Tribal members to achieve a level of economic self-sufficiency unheard of even a generation ago. Today, the Tribes are able to engage in negotiations with the energy industry, secure better deals and more revenues for Tribal governmental services for residents of the Reservation, and provide stability and certainty to the energy industry.<sup>6</sup> The overwhelming majority of comments and testimony on section 1813 support the continuation of bilateral negotiations.

**Consent Poses No Threat to National Security.** The Report finds that there is no evidence that tribal consent contributed to or would be an issue in an emergency situation.<sup>7</sup> Significantly, the Departments were not persuaded by the energy industry's unsupported claims. In fact, the most any industry representative claimed was that supplies of a disruption of energy products could happen in the future, and if it did happen, that could upset deliveries to

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<sup>4</sup> Section 16 of the Indian Reorganization Act, 25 U.S.C. § 476 (e).

<sup>5</sup> Report at 23.

<sup>6</sup> The stalemate between the Navajo Nation and El Paso cited in the scoping meetings appears to be limited and isolated situation, and should not be used as an example to negate the many successful negotiations between tribes and the energy industry.

<sup>7</sup> Report at 15.

communities. In contrast, the overwhelming testimony of tribes and energy companies showed that they consistently reached agreement through negotiations. The nation's energy supply will not be disrupted by the negotiation of rights-of-way across Indian reservations.

**No impact on the Nation or Consumers.** The Departments determined that the tribal right of consent is not driving up the cost of energy for the nation or consumers.<sup>8</sup> Again, this finding rejects the false claims made by some of the energy representatives. During the hearings and comments period, not one entity identified a single circumstance where compensation paid to a tribes for a specific grant or renewal of any right-of-way actually resulted in a substantial increase in the delivery prices to the consumers of any energy product. As noted in the Report, rights-of-way acquisition costs are a small component of pipeline transportation costs, especially compared to labor and material costs. We support this finding.

**Historical Rates of Compensation Paid to Tribes.** The Departments were charged with analyzing the historic rates of compensation paid for energy rights-of-way on tribal lands. We believe that the Departments analysis is severely lacking and limited. The Report presents general information about the diversity of rights-of-way on tribal lands, but fails to reach any conclusions about the historic rates. Many tribes, including the Shoshone-Bannock Tribes, presented numerous examples and data demonstrating the shamefully low rates of compensation received for their rights-of-way on tribal lands. Yet, the Report fails to document these undervalued rates and says nothing about the practices and mismanagement of the Bureau of Indian Affairs on rights-of-way matters.

As we stated at the first scoping meeting, in written comments, and reiterate here again, we do not agree that the case study approach is the best means to gather the necessary information and data requested by the Congress. Moreover, the approach is not fairly representative of the thousands of energy rights-of-way over tribal lands. In May, numerous tribes, including us, submitted to the Departments comprehensive information on the historic rates of compensation paid to us. The Departments virtually ignored this information and chose instead to only consider four tribes through a case study approach. The Departments admit "the data included in this report do not constitute a comprehensive review of rates paid for energy ROWs on tribal lands."<sup>9</sup> We think this approach is very limiting and does not represent the many issues and unique situations of energy rights-of-way facing tribes across the nation.

The Congress requested data and information relating to the basic historic rates of compensation received by Indian tribes and individuals Indians. In addition to this data, the Departments must recognize that any discussion of rights-of-way must be understood in the context of the history, economics and geography of Indian reservations. Moreover, the Departments should consider the actual process of securing the rights-of-way and other critical issues relating to the rates. These issues have affected the historical rates and continue to impact the present day negotiations with energy companies and compensation received. The case studies reflect the unique situation of only four tribes, and their situations cannot be generalized or used for other reservation circumstances. The case studies do not permit the Departments to

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<sup>8</sup> Report at 24.

<sup>9</sup> Report at 2.

make reliable assessments of the extent to which tribes have been historically under compensated for rights-of-way over their land for energy purposes.

**Unwarranted Options.** The Report sets forth several options for Congress to consider. These options are particularly troubling and unwarranted. The Congress requested the Departments to present recommendations, and if the Departments are not inclined to make any recommendations, then they should not propose any options. Significantly, the Departments state,

. . . the Departments list below a range of options that Congress could consider if it concludes that these difficulties [in negotiations] merit a legislative solution. Some of these options would involve major changes to the long-standing relationship between the tribes and the federal government concerning tribal sovereignty and the federal policy of tribal self-determination – in particular, the principle that tribal lands should not be alienated without a tribe’s consent. These options should not be considered recommendations from the Departments

The record and testimony of tribes and industry document that the bilateral negotiations for rights-of-way crossing tribal lands have been successful and continue to be working well. Indeed, the Departments have so determined in the Report that the negotiations have not affected costs to consumers or the nation, pose not threat to national security, and consent of the tribes should be obtained for a right-of-way across tribal lands. Given these findings, the options are inconsistent with the Report, and are clearly unwarranted and unnecessary.

We are particularly concerned with and urge the Departments to delete the options which (1) authorize a federal agency to determine compensation rates based on fair market value, (2) require binding valuation procedures, and (3) authorize the condemnation of tribal lands.

**Fair Market Value Option.** One option supports the energy industry’s claim that fair compensation can be determined by a standard formula based on fair market value.<sup>10</sup> The Departments propose “Congress could direct the executive branch to establish a federal entity to determine fair compensation for all energy ROWs across tribal lands.” This proposal ignores the uniqueness of the Treaty guaranteed homeland of the tribes and fails to consider the past inequities. To tribes, land is a fundamental attribute of sovereignty, it is a source of family ties and existence, and links the Shoshone and Bannock peoples to the past. Our land base is the linchpin to other attributes of sovereignty. The Tribal territory forms the geographical limits of the Tribes’ jurisdiction, supports a residing population, is the basis of the Tribal economy, and provides an irreplaceable forum for religious practices and cultural traditions premises on the sacredness of land. This unique quality of Tribal lands and self-government has been clearly recognized by treaties with the United States government.

Moreover, it must be understood that Indian lands are not marketable like private lands off-reservation, and cannot be sold. The Tribal lands are held in trust by the United States and

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<sup>10</sup> Report at 28, Option c.

can only be rented through leases. Because marketability lies at the heart of fair market value, and Indian lands are not marketable, it is clear that any conventional market data approach to appraisal is inapplicable to Indian lands. Moreover, no economic value can be placed on the historical, cultural and religious significance of tribal lands to tribal people.

Additionally, no uniform or sets of formulas devised by federal agencies can account for the diversity of tribal values and circumstances throughout Indian country. There is no basis to subject all tribal lands to the same valuation standards used for public lands or other federally owned lands. We know the federal government in many instances chooses to undervalue its lands so as to promote national energy issues, but tribes have no reason to undervalue their lands.

Next, the approach of replacing tribal consent to a right-of-way based on a negotiated price set by a federal agency is totally inconsistent with the case precedent upholding tribal consent and the established federal policy of self-determination. The Tribes presented in their May comments the current negotiations process used by the Tribes and the success of such negotiations because the Tribes, not the Bureau of Indian Affairs, conducted the negotiations. The end result has been a reversal of the paternalistic practices of the Bureau of Indian Affairs in negotiating rights-of-way on the Reservation and enabled the Tribes and individual Tribal members to achieve a level of economic self-sufficiency unheard of even a generation ago. Today, the Tribes are able to engage in negotiations with the energy industry, secure better deals and more revenues for Tribal governmental services for residents of the Reservation, and provide stability and certainty to the energy industry. The opportunities for tribal self-sufficiency and development of the Tribal economy come from the fundamental sovereign power of the Tribes to control and regulate land use, including rights-of-way.

Finally, any legislation to standardize a fair market value set by a federal agency would undermine the tribal power and seriously compromise the strides made by tribes to protect their lands. If a fair market value approach is permitted to be applied by a federal agency, the past paternalistic practices of the federal agency in negotiating abhorrently low rates of compensation for the Tribes would be resurrected. This is contrary to the long-standing federal policy of tribal self-determination and the Energy Policy Act of 2005. This option should be deleted from the Report.

**Binding Negotiation Procedures Option.** The Departments also propose that “Congress could modify the current process for energy ROW agreements by establishing binding procedures to resolve any impasse that may result in negotiations” including binding arbitration or requiring the parties to accept fair compensation determined by a federal agency.<sup>11</sup> This option is simply condemnation in another form. This process would grant a right-of-way without tribal consent and provide payment to the tribe (it has not agreed to) as set by some binding outside authority. It is exactly like an eminent domain action. We oppose any condemnation in any form.

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<sup>11</sup> Report at 30, Option d.

As discussed above, tribal lands have unique cultural, religious and historic significance that cannot be measured in uniform economic terms. This is a very extreme option to replace the consent requirement which has worked for many decades. Moreover, by giving final authority to grant a right-of-way and set compensation in a federal agency would entrust the determination to agencies that historically have failed to obtain fair market value for tribal lands. This approach certainly would be step backwards in the era of tribal self-determination. The option should be deleted from the Report.

**Condemnation of Tribal Lands Option.** The Departments finally propose “Congress could specifically authorize condemnation of tribal lands for public necessity.”<sup>12</sup> There is absolutely no basis in the testimony or written comments to support this option. Indeed, as the Departments have readily admitted,

Some of these options would involve major changes to the long-standing relationship between the tribes and the federal government concerning tribal sovereignty and the federal policy of tribal self-determination – in particular, the principle that tribal lands should not be alienated without a tribe’s consent.

This option is not just a “change”, but would be a major reversal of the established federal law that recognizes tribal ownership of and sovereign control over tribal lands. Current law requires tribal consent to rights-of-ways across tribal lands. These basic principles are compelled by the federal government’s trust relationship to Indian tribes and their lands and the federal government’s longstanding policy of tribal self-determination. Such an option is totally inconsistent with the Energy Policy Act of 2005 which supports tribal self-determination and the many decades of Congressional and Executive promotion of tribal self-sufficiency. The Energy Policy Act of 2005 established Indian energy programs in order to “further the goal of Indian self-determination” and “promote Indian tribal energy development.”<sup>13</sup> The Act incorporated the tribal self-determination policy as a guiding principle, requiring agencies to act “in accordance with Federal policies promoting Indian self-determination.”<sup>14</sup> The Departments’ option of condemnation flies in the face of the Energy Policy Act’s goals.

Furthermore, this option is particularly disturbing given the Departments’ acknowledgement in its Report that

Requiring consent of a tribe before granting a ROW over its lands is in accordance with the federal policy of promoting Indian self-determination. The tribal consent requirement has been virtually unchanged since 1951. It reflects a longstanding interpretation of

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<sup>12</sup> Report at 31, Option e.

<sup>13</sup> Energy Policy Act of 2005, title V. §§ 502, 503(a), codified at 42 U.S.C. § 7144e, 25 U.S.C. § 3502(a)(1).

<sup>14</sup> Id. § 502(a).

the pertinent statutes by the agency charged with their administration.<sup>15</sup>

The Departments further recognize

A tribe's determination of whether to consent to an energy ROW across its land is an exercise of its sovereignty and an expression of self-determination. The implication of any reduction in the tribe's authority to make that determination is that it would reduce the tribe's authority and control over its land and resources, with a corresponding reduction in its sovereignty and abilities for self-determination.<sup>16</sup>

We question why the Departments would propose a condemnation process in light of its numerous findings in support of tribal self-determination. There is no basis for this option and it should be deleted from the Report.

In addition, the option of authorizing condemnation of tribal lands would likely contravene the Fifth Amendment and make the United States liable to pay just compensation to tribes. It is undisputed that there exists a general trust relationship between the United States and Indian tribes.<sup>17</sup> The trust doctrine operates as a limit on the power of Congress over Indian affairs and their property. Accordingly, the Supreme Court, in *Delaware Tribal Business Committee v. Weeks*<sup>18</sup>, expressly stated that judicial review is available to review statutes affecting Indians and held that federal legislation affecting Indians must be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians."<sup>19</sup> To be valid any Congressional enactments must be tied rationally to the trust obligations.

In the present right-of-way context, any change in the existing legal requirement that tribes must consent to rights-of-way granted over their lands would likely fail to satisfy the constitutional standard. In the alternative, tribes would have a Fifth Amendment takings claim against the United States for the value of the tribes' right to grant a right-of-way across tribal lands.

Tribes should continue to have the right to negotiate compensation for use of tribal lands that gives tribes a fair share of the economic benefits produced for use of their lands. Such revenues sustain tribal governments. The Tribal consent requirement permits tribes to protect and preserve their jurisdiction, environment, and cultural and natural resources. Any change to tribal consent would severely affect tribal sovereignty.

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<sup>15</sup> Report at 13.

<sup>16</sup> Report at 14.

<sup>17</sup> *Choctaw Nation v. United States*, 119 U.S. 1 (1886); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

<sup>18</sup> 430 U.S. 73 (1977).

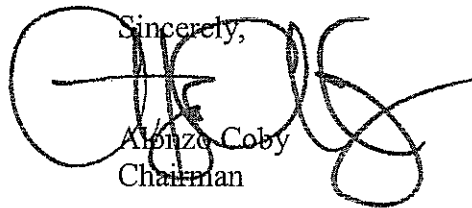
<sup>19</sup> *Id.* at 85 (quoting its earlier decision in *Morton v. Mancari*, 417 U.S. 535, 555 (1974)).



**Tribal Sovereignty and Trust Responsibility.** The Congress called upon the Departments to assess the tribal self-determination and sovereignty interests implicated by grants, expansions and renewals of energy rights-of-way on tribal lands under the third study area. We and many other tribes submitted extensive comments regarding the sovereign interests of tribes that are impacted by the rights-of-way across tribal lands. First and foremost, treaties and agreements that reserved the aboriginal lands of tribes are impacted. These treaties are legal documents directly impacting federal authorities, the trust responsibility owed to tribes by the United States, and the rights-of-ways on tribal lands. The Report leaves out all but a brief mention of treaties and their paramount importance to tribes and the federal government. The Report also gives short shift to the issue of tribal sovereignty and the impacts on it by rights-of-ways. We recommend that the Departments add a discussion of treaties and elaborate more on tribal sovereignty.

Finally, we recommend that an Executive Summary of the Departments conclusions be drafted for the Final Report to be presented to Congress.

In conclusion, if you should have any questions regarding our comments please contact Jeanette Wolfley at (208) 232-1922.

Sincerely,  
  
Alvin Coby  
Chairman

cc: Fort Hall Business Council